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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 597

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 560, a labor organization; ROBERT LENAGHEN, LORA DENKERS, MEL SIMPSON, *Appellants*

v.

J. J. NEWBERRY COMPANY, a corporation, *Appellee*

On Appeal from the Supreme Court of the State of Idaho

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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INDEX

Page

(a) Claim of Federal Preemption 1

(b) Question of Free Speech 9

Conclusion 11

TABLE OF CASES

American Federation of Labor v. Swing, 312 U.S. 321 11

Building Service Employees v. Gazzam, 339 U.S. 532..7, 10

Capitol Service, Inc. v. N.L.R.B., 204 F. 2d 848..... 5

Garner v. Teamsters Union, 346 U.S. 485.....2, 8, 9

Giboney v. Empire Storage & Ice Co., 336 U.S. 490 7

Local No. 25 v. N.Y., N.H. & H. R.R. Co., 76 S. Ct. 227 2

Weber v. Anheuser-Busch, Inc., 348 U.S. 468..... 2, 8

STATUTES

National Labor Management Relations Act as amended

Sec. 7, 29 U.S.C.A. Sec. 157.....2, 3, 4, 5

Sec. 8, 29 U.S.C.A. Sec. 158.....1, 3, 4, 5, 7

OTHER AUTHORITIES CITED

International Union of Operating Engineers, Local Union No. 12, and Shepherd Machinery Co., Case No. 21-CB-805. 39 L.R.R. 38 (Nov. 19, 1956)..... 6, 7

International Union of Operating Engineers, Local Union No. 12, and Mrs. Erwin Selvin, Case No. 21-CC-229 6

Local 639 Teamsters, and Curtis Brothers, Inc., Case No. 5-CB-190. 39 LRR 46 (Nov. 26, 1956)..... 6, 8

Ruffalo's Trucking Services, Inc., 2-CC-379 and 384 consolidated with Cases Nos. 2-CB-1720 and 1763. LRR (Nov. 26, 1956) Vol. 39, No. 7, 39 Analysis 16.. 6, 8

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This brief is in reply to appellee's motion to dismiss the appeal, and supporting brief. Appellee seeks dismissal on various grounds. However, we desire to limit our reply to certain of appellee's arguments under (a) claim of federal preemption, and (b) question of free speech.

(a) Claim of "Federal Preemption"

Appellee endeavors to demonstrate that the picketing in the instant case is not an unfair labor practice under section 8(b)(1) or 8(b)(2) of the Labor Management Relations Act, and that therefore federal preemption does not lie. Appellee errs in this conclusion as will be shown, but more important, it misconceives the principles of federal preemption as

laid down by this court. Whether or not the Union's conduct constitutes an unfair labor practice is a matter to be determined by the Labor Board in the first instance, particularly where the conduct complained of may be reasonably deemed to come within the purview of the Taft-Hartley Law. If not prohibited activity, it may come within the protection of section 7 of the law. Confusion and mischief would result if the courts were free independently of the Labor Board to pass on the question of unfair labor practice and to by-pass the administrative scheme established in the Labor Management Relations Act. Particularly is there a lack of appreciation in appellee's brief of the proposition that if the conduct complained of is not prohibited, it may well be protected activity under the provisions of the Labor Management Relations Act.

Local No. 25 v. *New York, New Haven, & H. R. Co.*, 76 S. Ct. 227.[1]
Weber v. *Anheuser-Busch Inc.*, 348 U.S. 468.[2]
Garner v. *Teamsters Union*, 346 U.S. 485.[3]

Appellee insists that the allegations in the original complaint relative to the Union's objectives in picketing, be regarded as having no effect. Appellants' reference to such allegations in the original complaint (that the picketing had as its objective the intimidation and coercion of plaintiff's employees to join and become members of the Union), were significant statements of matters within the purview and jurisdiction of the Labor Management Relations Act. While no longer part of the controlling pleadings by

[1] Page 14, Jurisdictional Statement.
[2] Page 13, Jurisdictional Statement.
[3] Pages 15, 16, Jurisdictional Statement.

reason of the amendment, it remains a part of the record. The amendment did not change the nature of the controversy. It had the effect of expanding the alleged objectives of the picketing since an "unlawful contract" covers more aspects reasonably involving unfair labor practices than an allegation of coercion of employees into union membership, standing alone. Indeed, an "unlawful contract" usually encompasses membership in the union as a condition of employment. Reference to the original complaint supports this premise. In any event, the complaint, amended and original, presented a picture of alleged unfair labor practices which in the first instance should have been determined by the National Labor Relations Board. Federal preemption cannot be lost by a mere reshuffling of words.

Even if viewed in terms of the amended complaint only, the Union's conduct in picketing for a contract without any representation and against the wishes of the employees in the Newberry store, raises a serious question of violations of employee rights under sections 7, 8(b)(1), and 8(b)(2) of the Labor Management Relations Act.[4]

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[4] Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of

Appellee seeks to demonstrate that recognition picketing without employee representation is not an unfair labor practice notwithstanding the fact that the findings in this case involve picketing for a contract which encompasses and goes beyond picketing for recognition. A labor contract covers wages, hours, and working conditions and often includes a union shop provision requiring membership in the union. Indeed, the only contract in evidence which was the Union's standard contract in Pocatello, covered these subject matters and provided for a union shop. (Ex. 23, R. 281) This contract was executed by 50 employers in Pocatello. (R. 282) Plainly, therefore, in the posture of this case, picketing for a contract without employee representation entails a denial of employee rights to self-organization, to bargain collectively through representatives of their own choosing, and to refrain from such activities as set forth in section 7 of the Act, and otherwise involves unfair labor practices within the meaning of sections 8(a)(3), 8(b)(1), and 8(b)(2).

The court found that the picketing was for the purpose of coercing Newberry into contracting with

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the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

the Union. Reference to recognition picketing is nowhere found in the court's opinion—it is appellee's own creation. However, even on this limited issue, whether recognition picketing under the circumstances of the case constitutes an unfair labor practice, presents a fair question which must be initially determined by the Board. The record discloses that the Union withdrew its petition for an election following a repudiation of the union by the employees. Picketing even for bare recognition under these circumstances could reasonably be construed as depriving employees of rights under section 7 of the Act and as an unfair labor practice under section 8(b)(1)(A).

The Ninth Circuit Court of Appeals in *Capitol Service, Inc.* v. *National Labor Relations Board*, 204 F. 2d 848, stated,

> The language of 8(b)(1)(A) prohibiting restraint and coercion by a labor organization is the same in this regard as Section 8(a)(1) providing for an EMPLOYER, that (a) "It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by Sec. 7 of this title."
>
> The Supreme Court has held of Section 8(a)(1) of the Wagner Act, which is the same as in the Taft-Hartley Act, that the test whether the employer has violated the "restrain" provision is whether "the words or deeds * * * taken in their setting, were reasonably likely to have restrained the employees' choice and [whether] the employer may fairly be said to have been responsible for them * * *" N.L.R.B. v. Link Belt Co., 311 U.S. 584, 599, 61 S. Ct. 358, 85 L. Ed. 368. It is

inconceivable that the Taft-Hartley Act intended the identical words of 8(a)(1) and 8(b)(1) to have a different meaning when applied to a labor organization from that when applied to an employer. The Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act.

Nothing could more strongly restrain Service's employees from retaining their non-union status or coerce them into joining the Bakery Union than stopping or making intermittent their employment by persuading the public to boycott the products of their work.

Appellee cites administrative rulings of the General Counsel, which have been superseded. (Brief of appellee, p. 13.) More recently, the present General Counsel on behalf of the Board authorized and issued complaints of unfair labor practices in which it is alleged that picketing for recognition on the part of a union without majority status constitutes an unfair labor practice. See:

Intl. Union of Operating Engineers, Local Union No. 12, and Shepherd Machinery Co., Case No. 21-CB-805. 39 L.R.R. 38 (Nov. 19, 1956)

Intl. Union of Operating Engineers, Local Union No. 12, and Mrs. Erwin Selvin, Case No. 21-CC-229

Local 639 Teamsters, and Curtis Brothers, Inc., Case No. 5-CB-190. 39 L.R.R. 46 (Nov. 26, 1956)

Ruffalo's Trucking Services, Inc., 2-CC-379 and 384 consolidated with Cases Nos. 2-CB-1720 and 1763. L.R.R. (Nov. 26, 1956) Vol. 39, No. 7, 39 Analysis 16.

In the *Shepherd Machinery Co.* case,[5] Trial Examiner Howard Myers concluded, ". . . the activities and conduct of Local 12, as epitomized above, even though it was in the form of picketing, was illegal restraint and coercion and hence violative of Section 8(b)(1)(A) of the Act." Trial Examiner Myers placed great reliance on this court's ruling in

> *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490
> *Building Service Employees* v. *Gazzam*, 339 U.S. 532

and in that connection stated:

> The Supreme Court of the United States, within recent years, in cases involving facts similar to those now before us, has condemned the unlawful use of economic power by unions to compel employers to violate the law.

The intermediate report made special reference to the *Gazzam* case where the employer had been asked by the union to sign a contract even though none of the employees were members of the union. The court in *Gazzam* stated at page 540,

> . . . Here, as in *Giboney*, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the state. *That state policy guarantees workers free choice of representatives for bargaining purposes. If respondent had complied with petitioners' demands and had signed one of the tendered contracts and lived up to its terms, he would have thereby coerced his*

[5] Trial examiner rulings are not officially reported, but copies are available through the Board offices in Washington, D. C. Digests and comments are found in the *Labor Relations Reporter*. See citations above.

> *employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative.* (Emphasis added.)

Trial Examiner Sidney Lindner concluded in the *Curtis Brothers* case[5] that the union's conduct did not violate the Act, but impliedly held that it was protected activity. The *Ruffalo* case has been heard and is awaiting the trial examiner's report. These matters are now before the Board and can be decided only by the Board in the first instance.

Plainly, the problem of recognition picketing is a matter within the purview of the Board's jurisdiction, and a state court is without power to enjoin such picketing. Newberry in the instant case in no way sought relief from the Board, but instead obtained a state court injunction.

Appellee errs in its analysis of *Garner* and *Weber*. It seeks to limit these decisions to the precise factual situations presented there and as constituting a determination by this court that unfair labor practices occurred in those cases. Appellee ignores and makes no reference to the basic guiding principles relative to federal preemption as enunciated in those cases, particularly the holding in *Garner*.

> . . . It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. (346 U.S. 485).

Nor does appellee demonstrate any recognition of the holding in *Weber* (at page 478):

> We do not mean to pass on the question whether the Board, by finding that no violation of (D) was involved, inferentially ruled that other subsections were or were not violated. *The point is rather that the Board, and not the state court, is empowered to pass upon such issues in the first instance . . . Congress has lodged in the Board responsibility for determining in the first instance whether the same considerations apply to (A) or (B) as apply to (D).* (Emphasis added.)

Appellee draws the distinction between picketing to coerce an employer into compelling employees to join the union—the factual situation in *Garner*—and picketing by a union without representation to force an employer into granting the union a contract as found by the Idaho courts. No difference exists in principle between these situations. Each is designed and has the effect of depriving employees of rights under the Labor Act through pressure on the employer. Indeed, of the two objectives, picketing for a contract covers a broader deprivation of employee rights since so much more is involved in a contract than mere membership in a union.

It is respectfully asserted that appellee's argument relative to federal preemption is without merit.

(b) The Question of Free Speech

As the jurisdictional statement makes clear, the picketing in this case notwithstanding appellee's conjectures, consisted of a peaceful patrol with a truthful sign and no more. Appellee projects its views on the picketing with fanciful objectives, drawing unsupported inferences of its own (Brief of appellee, pages 16, 18). These are in no way supported by the

findings of the court. Concededly the Idaho Supreme Court found that the picketing was for an unlawful purpose, i.e., to compel Newberry to enter into an unlawful contract. This was the sole basis for attributing an unlawful objective to the picketing. But once this purpose is stated, does appellate review end there? Must there not be a rational base to the finding of an unlawful purpose? Can an unsupported finding that the picketing was to obtain a contract be the basis of a finding of unlawful purpose when in fact at no time did the union present to, or discuss with appellee a contract or proposed agreement? Appellants contend that an injunction against picketing under such circumstances violates constitutional rights.

In *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532, the union was given every opportunity to organize the employer's workmen. Four meetings were held by union representatives with the employer, and each time the employer was asked to sign a contract and four times refused. After such a chain of conduct, it was relatively simple for the state court to conclude that the ensuing picketing had as its purpose to compel the employer to coerce his employees. And further, note how this Court narrowly defined the question presented in *Gazzam:* "Does the injunction, limited as it is to restraining petitioners from picketing respondent's hotel for the purpose of compelling him to coerce his employees' choice of bargaining representatives, constitute an abridgment of the right of free speech under the First and Fourteenth Amendments?"

But here the Idaho court specifically found that no contract was presented to appellee, and no action of any kind was taken beyond the advertising picket.

It is in this context that the free speech question assumes its importance. Appellants' reliance on *American Federation of Labor* v. *Swing,* 312 U.S. 321, was more for the broad principle that peaceful picketing cannot be narrowly restricted by a state court rather than any claim that this case was decided on the issue of stranger picketing.

The penetrating aspect of the free speech question here is whether a state court, by artificially attaching a finding of interference with freedom of contract on all forms of organizational or advertising picketing, can outlaw all such picketing. If such be the case, then indeed *Swing* is dead. But appellants insist that their right to advertise the non-union status of appellee, unaccompanied by any coercive conduct, still retains some constitutional vitality. That is the real free speech question in this case, and it is of sufficient substance to warrant this Court's assumption of jurisdiction and reversal of the Idaho Supreme Court.

CONCLUSION

The motion to dismiss the appeal should be denied.

Respectfully submitted,

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